

6-1-1984

Disclaimer of Warranty & (and) Limitation of Remedy in Consumer Sales: A Comparison of the Approach in Nigeria and the United States

Charles O. Agege

Recommended Citation

Charles O. Agege, *Disclaimer of Warranty & (and) Limitation of Remedy in Consumer Sales: A Comparison of the Approach in Nigeria and the United States*, 7 Loy. L.A. Int'l & Comp. L. Rev. 309 (1984).

Available at: <http://digitalcommons.lmu.edu/ilr/vol7/iss3/1>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL

VOLUME 7

1984

NUMBER 3

Disclaimer of Warranty & Limitation of Remedy in Consumer Sales: A Comparison of the Approach in Nigeria and the United States

CHARLES O. AGEGE*

I. INTRODUCTION

It is not uncommon to find parties to a contract seeking to disclaim or limit warranties, or limit the remedies which would otherwise arise from breach of these warranties. There is nothing inherently objectionable in this where the parties are bargaining on an equal footing and the contract is the result of a genuine agreement between them. Thus, it has long been recognized that there should be freedom to contract between parties of full capacity.

In many cases, however, there will be no semblance of genuine agreement or of equality of bargaining power between the parties. Thus, in the take-it-or-leave-it type of transactions that characterize many modern-day consumer purchases, the consumer is placed in a very difficult situation. A viable mechanism for promoting equality and fairplay is therefore needed. According to the Molony Committee:¹

The overriding argument in favour of prohibiting 'contracting-out' is that it enables well-organised commerce consistently to impose unfair terms on the consumer and to deny him what the law means him to have. This benefit is obtained without the consumer know-

* LL.M., Lecturer in Law at the University of Benin, Nigeria. Currently a J.S.D. Candidate at the Stanford Law School.

1. The Royal Commission on Consumer Protection [Molony Report], CMD. 1781, No. 435 (1962).

ing how he is being treated. If a particular consumer is alive to the position he will find it difficult, and sometimes impossible, to avoid submitting to the terms of business universally adopted. Because the percipient customer is in a small minority the trades concerned can afford to refuse to modify their usual terms at his behest. He possesses no bargaining power of sufficient weight to compel. This is the essence of the case for intervention in support of the consuming public. We endorse the soundness of the case and accept the need to ban 'contracting-out'.

This paper will critically examine the legal position of warranty disclaimers and limitation of remedy in consumer sales in Nigeria and the United States. References will be made to developments in other jurisdictions where appropriate.

II. THE NIGERIAN SITUATION

Section 55 of the Sale of Goods Act² provides that:

Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.³

Since the Sale of Goods Act does not discriminate between consumer and non-consumer sales,⁴ both consumer and non-consumer buyers are treated alike. This is a very unfortunate situation given the myriad of problems confronting the Nigerian consumer. Since there is no special legislation protecting consumers from disclaimer abuse by sellers, the burden is on the courts to apply the existing common law principles in such a manner so as to ensure that equity and fairplay is maintained. These common law principles will now be examined.

A. Incorporation

A seller of goods cannot rely on an exemption clause⁵ unless he

2. Sale of Goods Act, 1893, §§ 56 & 57 VICT., ch. 71, a statute of general application, was made applicable in Nigeria through the Interpretation Act, Cap. 89, §§ 45, Laws of the Federation and Lagos (1958 rev. ed.).

3. Sale of Goods Act, 1893, §§ 55.

4. Cf. British Unfair Contracts Act, 1977, § 6(2), which renders nugatory, as against a person dealing as a consumer, attempts to exclude or restrict liability in respect of the implied warranties contained in sections 13-15 of the Sale of Goods Act, 1893.

5. The term "exemption clause" is used in a broad sense to cover clauses relied on by the seller to disclaim or limit remedies. Unlike the Uniform Commercial Code, the Sale of Goods Act, 1893, does not specifically provide for limitations of remedies. However, the exclusion or limitation of remedies seem to be provided for in the Sale of Goods Act, 1893, § 55.

can establish that the clause was incorporated in the sales contract from which he seeks protection. This requirement of incorporation will readily be satisfied when the consumer has signed the document containing the clause.⁶ Thus, absent fraud or misrepresentation, a person is normally bound by the terms of a document he has signed.⁷ This is so even though he has neither understood nor read it,⁸ so long as the document is a contractual document and not a mere receipt.⁹

Where there is no signed contractual document, exemption clauses may still be incorporated into the contract provided that the purchaser has received reasonable notice. The sufficiency of notice will depend on a number of factors. Thus, it may be necessary to consider the nature of the document which contains the clause, the size and intensity of the print,¹⁰ and the type of damage or loss against which protection is sought.¹¹ The exclusion of liability for personal injury would often need to be more explicit than in cases of property damage.¹²

Commenting on the question of notice in *Olley v. Marlborough Court Ltd.*,¹³ Lord Denning said:

Now people who rely on a contract to exempt themselves from . . . liability must prove that contract strictly. Not only must the terms of the contract be clearly proved, but also the intention to create legal relations The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him before or at the time of the contract a written notice specifying its terms and making it clear to him that the contract is on those terms. A prominent public notice which is plain for him to see when he makes the contract or an express oral stipulation would, no doubt, have the same effect. But nothing short of these three ways will suffice.¹⁴

The factor of notice was also in issue in the case of *Odeniyi v.*

6. *L'Estrange v. F. Graucob, Ltd.*, [1934] 2 K.B. 394, 403.

7. *Id.*

8. *Id.* See also, *Chagoury v. Adebayo*, [1973] 3 U.I.L.R. 532, 535.

9. *Chapelton v. Barry, Urban Dist. Council*, [1942] 1 K.B. 532, 538-539.

10. *Cf.* UNIFORM COMMERCIAL CODE § 2-316(2) (1978) (requiring the warranty disclaimer to be conspicuous).

11. See e.g., *Thorton v. Shoe Lane Parking Ltd.*, [1971] 1 All E.R. 686, 689-90 (Lord Denning, M.R.).

12. *Id.* at 692 (Miglaw, L.J.).

13. [1949] 1 K.B. 532.

14. *Id.* at 549.

*Zard & Co. Ltd.*¹⁵ The plaintiff sued for damages for non-delivery of goods. The defendants contended that they had discovered an error in the selling price of the goods after payment had been made by the plaintiff, and as such they were entitled to withhold delivery and to ask the plaintiff to elect between receiving back the money paid or re-negotiating for the purchase of the goods at the discovered price. They also contended that the letters "E and OE" — the abbreviation for errors and omissions excepted — printed on the receipt issued to the plaintiff were sufficient notice that the goods were sold subject to conditions. The court held that the letters "E and OE" were incapable of putting anyone on notice either of its meaning, or that it constitutes a condition of the contract between the parties. If wisely used, the requirement of notice may to some extent serve as a check on sellers who use exemption clauses as a "booby trap" for the unwary consumer.

The court may infer notice from previous dealings between the parties. Where there is a consistent course of prior dealings, the present contract may be viewed as having been concluded on the same terms even though notice has not been given afresh.¹⁶ However, Lord Devlin stated that "[p]revious dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them."¹⁷ It is true that "[i]f a term is not expressed in a contract, there is only one other way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him."¹⁸ Since exemption clauses are meant to curtail the remedies which would otherwise be available to the consumer, it is only fair that the consumer should be fully aware of such a clause.

B. *The Contra Proferentem Rule*

As noted above, there is no legislation protecting consumers from disclaimer abuse by sellers, but the courts are quite determined to use existing common law principles to restrict the scope of exemption clauses. Thus, where an exemption clause is taken to have been incorporated into the contract, it will be construed contra profer-

15. [1972] 2 U.I.L.R. 34, reprinted in SAGAY, A CASEBOOK ON THE NIGERIAN LAW OF CONTRACT, PROFESSIONAL BOOKS 165 (1983).

16. This is specifically provided for in the Sale of Goods Act, 1893, § 55. See *Henry Kendall & Sons v. William Lillico & Sons, Ltd.*, 1969 2 A.C. 31.

17. *McCutcheon v. David MacBrayne Ltd.*, [1964] 1 All E.R. 430, 437.

18. *Id.*

entem. The clause is given the narrowest possible scope consistent with the intention of the parties. All ambiguities will be resolved against the party seeking to rely on it.

The contra proferentem was applied by the High Court of Western State,¹⁹ in *Odeniyi v. Zard & Co. Ltd.*,²⁰ where Justice Johnson stated:

The meaning attributed to the letters E and OE by the defendants is peculiarly within their own knowledge as the letters are capable of other meanings besides the ones given. This is not what the law requires to make such a condition binding. If as in this case a party to a contract chooses to hide the true meaning of any conditions he intends to bind the other party, he does so at his own peril and the court will not resolve any obscure or ambiguous term in favor of the defaulting party.²¹

There is manifest good sense in construing an exemption clause contra proferentem. As the seller seeks to protect himself against liability to which he would otherwise be subject, the burden is on him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

C. Fundamental Breach

Although the contra proferentem rule can be used as a check on disclaimer abuse by sellers, its demands can easily be met by the use of an appropriate formula, the wording of which should not pose any real problem for the modern draftsman. It is therefore not uncommon to find widely drafted exemption clauses that are capable of covering any contingency that may arise. Absent legislative control on the use of exemption clauses, the courts responded by developing the doctrine of fundamental breach. The essential feature of this development was that even the most broadly drafted exemption clause came to be read with the understanding that it did not affect the central obligations of the contract.

The court held in *Suisse Atlantique Societe' d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*:

There is no magic in the words 'fundamental breach'; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or

19. Western State is now known as OYO State, Western Nigeria.

20. See *supra*, note 15.

21. *Odeniyi*, [1972] 2 U.I.L.R. at 38.

are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract.²²

There has been much controversy surrounding the true effect of a fundamental breach on an exemption clause.²³ There are two conflicting propositions: (1) that by a rule of law no exemption clause may operate to protect a party who is in fundamental breach of his contract; and (2) that the question is not one of substantive law but depends upon the interpretation of the individual contract before the court. The question, therefore, is which proposition should apply.

Traditionally, it was recognized that where there is a breach that goes "to the root of the contract,"²⁴ any exemption clause will be void and the party in breach cannot rely on it to escape liability. This principle was often treated and referred to as a rule of law and was applicable to the contract irrespective of the intention of the parties as expressed in the contract.²⁵ But in *Suisse Atlantique*, the House of Lords held inter alia that it is a question of construction in each case whether the exemption clause applies to the particular breach which has occurred, and that there is no absolute rule of law that an exemption clause cannot protect a party from liability for a breach of contract, whatever the gravity of the breach.²⁶ The *Suisse Atlantique* decision was not followed in all subsequent cases. In *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co.*,²⁷ Lord Denning said that an innocent party faced with a fundamental breach of contract:

Is entitled to sue for damages for the breach and the guilty party cannot rely on the exclusion or limitation clause: for the simple reason that he, by his own breach, has brought the contract to an end; with the result that he cannot rely on the clause to exempt or

22. 1967 1 A.C. 361, 421-22. It should be noted that not all breaches of warranties can be treated as "fundamental" in the sense referred to by Lord Upjohn. But there is no clear dividing line between those which can and which cannot. Thus, an otherwise minor breach may become fundamental if the consequences which flow from it are sufficiently grave as to strike at the root of the bargain. See *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co.*, [1970] 1 Q.B. 447, 466.

23. See Coote, *The Effect of Discharge by Breach on Exception Clauses*, 1970 CAMBRIDGE L.J. 221.

24. See *supra*, note 22. A breach that goes to the root of a contract is a "fundamental breach."

25. See *Alexander v. Railway Executive*, [1951] 2 K.B. 882; *Karsales Ltd. v. Wallis*, [1956] 1 W.L.R. 936; *Spurling v. Bradshaw*, [1956] 1 W.L.R. 461; *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.*, 1959 1 A.C. 576.

26. 1967 1 A.C. 361.

27. [1970] 1 All E.R. 225, 1 Q.B. 447.

limit his liability for that breach.²⁸

The House of Lords reversed the decision of the court of appeal in *Photo Production Ltd. v. Securicor Transport Ltd.*,²⁹ and held that there is no rule of law which prevents a party in fundamental breach of contract from relying on an exemption clause whose provision is broad enough to cover the breach.³⁰ This case therefore affirms *Suisse Atlantique*. The House of Lords further re-affirmed this rule of construction view in *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*,³¹ holding that whether an exemption clause applies to a fundamental breach or not is a matter of construction of the contract.

Nigerian courts, however, favor the "rule of law" approach. Thus, if a seller is in fundamental breach of his contract, he cannot rely on the exemption clauses in the contract.³² The case of *Etta v. Udo & Anor*,³³ is instructive. The plaintiff claimed damages for breach of an agreement for the purchase of a bread-making machine from the defendants. She was unwilling to buy the machine originally, but changed her mind when she was assured of its perfect condition. The machine turned out to be defective. The plaintiff brought suit for rescission of the contract. The defendants relied on the exemption clauses in the contract. The court, invoking the "rule of law" approach to fundamental breach, held that the defendants could not rely on the exemption clause. Justice Koofreh said:

The machine was found and proved to be incapable of producing bread on the first day of its use. At that stage, the main purpose or obligation which the contract implied, failed. The law cannot allow the defendant to avoid the consequences of that failure however well-worded [the exemption clause] may be.³⁴

Given the myriad of problems confronting the Nigerian consumer, it is encouraging to note that the Nigerian courts favor the "rule of law" approach to fundamental breach. This approach is highly desirable, since there is no legislation in Nigeria protecting consumers from widely couched or unreasonable exemption clauses.

28. Harbutt's "*Plasticine*" Ltd., [1970] 1 All E.R. at 234.

29. See *Photo Prod. Ltd. v. Securicor Transport Ltd.*, [1980] 1 All E.R. 556.

30. *Id.*

31. Reprinted in 131 NEW L.J. 480 (1980).

32. Adel Bashalli, [1961] 1 All N.L.R. 917.

33. [1974] 4 U.I.L.R. 178.

34. *Id.* at 191; noted in SAGAY, *supra* note 20.

III. THE UNITED STATES SITUATION

The law regulating warranty disclaimers in consumers sales is contained in the Uniform Commercial Code (UCC)³⁵ and the Magnuson-Moss Act.³⁶ The first part of this section will be devoted to an analysis of the UCC provisions, while the second part will focus on the Magnuson-Moss Act.

A. *The Uniform Commercial Code*

The Uniform Commercial Code provides two methods under which a seller may limit his contractual liabilities. First, section 2-316 permits the seller to disclaim or limit his warranties. Second, section 2-719 allows the seller to limit the buyer's remedies for a breach of warranty. Although the methods are closely related and may lead to substantially identical effects, they are distinct and therefore require separate consideration. The court in *Murray v. Holiday Rambler, Inc.*³⁷ explained that:

A disclaimer of warranties limits the seller's liability by reducing the number of circumstances in which the seller will be in breach of contract; it precludes the existence of a cause of action. A limitation of remedies, on the other hand, restricts the remedies available to the buyer once the breach is established.³⁸

The effect of a warranty disclaimer as governed by section 2-316 of the UCC is largely determined by the type of warranty in question. In the case of an express warranty, the disclaimer is likely to have little effect. Thus, while section 2-316 does not automatically invalidate disclaimers of express warranties, it renders ineffective attempted disclaimers to the extent they are inconsistent with the words or conduct creating the express warranty.³⁹ Thus, a disclaimer cannot override express warranties that are unambiguous.

"The very idea that a seller may disclaim an express warranty may seem illogical or dishonest."⁴⁰ A seller should not be allowed to

35. UNIFORM COMMERCIAL CODE §§ 2-312 to 2-318 (1972).

36. Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, 15 U.S.C.A. §§ 2301-2312 (West 1982) [hereinafter cited as the Magnuson-Moss Act].

37. 83 Wis. 2d 406, 265 N.W.2d 513, 517 (1978). See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-8, at 462 (2nd ed. 1980) [hereinafter cited as WHITE & SUMMERS].

38. *Murray*, 265 N.W.2d at 517-18. See WHITE & SUMMERS, *supra* note 37 § 12-11, at 471-72.

39. UNIFORM COMMERCIAL CODE § 2-316 (1977).

40. WHITE & SUMMERS, *supra* note 37 § 12-2.

disavow an express representation of his that by definition "was part of the basis of the bargain."⁴¹ It is interesting to note that the draft of the 1952 Code explicitly prohibited a seller from doing this, for section 2-316 then provided that "[i]f the agreement creates an express warranty, words disclaiming it are inoperative."⁴²

It is true that the UCC makes it difficult for the seller to disclaim an express warranty, but it is equally true that the operation of the parole evidence rule may substantially reduce the consumer's protection.⁴³ If the representations upon which the consumer relies took place before a final writing is prepared, then a clause purporting not only to disclaim warranties but to act as a merger clause may effectively bar proof of prior representations.⁴⁴

In contrast to the considerable difficulty of disclaiming an express warranty, disclaimer of implied warranties of merchantability,⁴⁵ or of fitness for a particular purpose⁴⁶ may be relatively simple under section 2-316. The UCC provides the seller with a specific set of requirements governing the presentation of such a disclaimer in the agreement.⁴⁷ To be effective against an implied warranty of merchantability, a disclaimer must "mention merchantability and in case of a writing must be conspicuous."⁴⁸ To exclude an implied warranty of fitness, the disclaimer must be both in writing and conspicuous.⁴⁹ Either warranty may also be disclaimed by language that in common commercial understanding indicates that the buyer is taking the goods with no implied warranties.⁵⁰

41. UNIFORM COMMERCIAL CODE § 2-313 (1976).

42. *Id.* § 2-316.

43. *See id.* § 2-202.

44. *See FMC Corp. v. Seal Tape Ltd.*, 90 Misc. 2d 1043, 396 N.Y.S.2d 993 (1977).

45. *See* UNIFORM COMMERCIAL CODE § 2-314 (1978).

46. *Id.* § 2-315.

47. *Id.* § 2-316. The policy underlying this section is not to prohibit or discourage disclaimers but simply to "protect the buyer from surprise." *Id.* at comment 1.

48. *Id.* § 2-316(2).

49. *Id.*

50. The drafters indicated that language such as "as is" and "with all faults" would be sufficient to meet this requirement. *Id.* § 2-316(3)(a). But the subsection gives the buyer an opportunity to nullify an "as is" clause by showing that "the circumstances indicate otherwise." One such circumstance might be the fact that the buyer is an ordinary consumer without knowledge of the consequences of "as is," "with all faults," or "as they stand." *See Knipp v. Weinbaum*, 351 So. 2d 1081, 1084 (Fla. Dist. Ct. App. 1977), *cert. denied*, 357 So. 2d 188 (Fla.) (finding that because of the language in the statute which said "[u]nless the circumstances indicate otherwise," a seller using the words "as is" cannot be automatically absolved of implied warranties; and that for the "magic words 'as is'" to absolve the seller, "both he and the buyer [must] understand this to be the meaning of the phrase.").

The meaning of "conspicuousness" is a very crucial issue in cases challenging the validity of a disclaimer. The UCC defines the term to mean language so "attention can reasonably be expected to be called to it."⁵¹ The UCC goes on to provide examples of ways in which a clause can be made sufficiently conspicuous, such as printing it entirely in capitals or in larger or contrasting type.⁵² It should be emphasized, however, that these examples are not meant to be exhaustive. Whether a disclaimer is conspicuous is always a question of fact for the court.⁵³ It must be further stressed that the disclaimer or limitation of warranty must be made conspicuous; the negative or limiting aspect of the provision must be reasonably certain to gain the buyer's attention. Thus, a disclaimer might be ineffective if only the comfort-ing term "Warranty" is made prominent, though the provisions as a whole would restrict the consumer's warranty protection.⁵⁴

The UCC provides the seller with a precise set of requirements governing warranty disclaimers. However, its provisions on modification and limitation of remedies set forth no guidelines on what a clause must say or how it must appear,⁵⁵ other than to require that the clause expressly state that a remedy is exclusive if it is to function as the sole remedy.⁵⁶ The UCC approves of provisions creating remedies "in addition to or in substitution for" those already provided by Article 2.⁵⁷ But in order to ensure "that at least minimum adequate remedies [are] available"⁵⁸ to buyers, certain limits are imposed on the

51. UNIFORM COMMERCIAL CODE § 1-201(10) (1978).

52. *Id.* For a case addressing the "conspicuousness" requirement in the context of an oral disclaimer, see *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (N.Y. Civ. Ct. 1972) (oral statement by auctioneer that goods are sold "as is," that neither repeated nor amplified, did not meet the "conspicuousness" requirement).

53. See UNIFORM COMMERCIAL CODE § 1-201(10) (1978).

54. Compare *Victor v. Mammana*, 101 Misc. 2d 954, 956, 422 N.Y.S.2d 350, 351 (N.Y. Sup. Ct. 1979) (disclaimer not conspicuous where only warranty appeared in large print and disclaimer was in small print and borderless) with *Basic Adhesives, Inc. v. Robert Matzkin Co.*, 101 Misc. 2d 283, 290, 420 N.Y.S.2d 983, 987 (N.Y. Civ. Ct. 1979) (disclaimer conspicuous where first word was "non-warranty" printed in capitals). It should be emphasized that a disclaimer meeting the requirements of § 2-316 will still be ineffective if it is not included as part of the original agreement, as where it appears on an invoice or owner's manual provided at the time of delivery. See *WHITE & SUMMERS, supra* note 37, at 45.

55. See UNIFORM COMMERCIAL CODE § 2-719 (1978).

56. See *Id.* § 2-719(1)(b). Cf. *Sale of Goods Act*, 1893, § 55, which also failed to set forth guidelines concerning warranty disclaimer or limitation of remedy.

57. UNIFORM COMMERCIAL CODE § 2-719(1)(a). The code specifically gives examples of allowable modifications, such as "limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts." *Id.*

58. *Id.* § 2-719(1).

right of the seller to limit or modify remedies.

The first such limitation comes into play only at the time a breach occurs. Section 2-719(2) provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."⁵⁹ This subsection is concerned with remedies that fail to achieve their intended purposes because of unforeseen circumstances arising at the time of the breach. The subsection is designed to ensure that the consumer obtains the benefit of his bargain.

The second restriction imposed by the UCC upon the modification or limitation of remedies is specifically directed toward those provisions that can be judged at their inception to be inequitable. This is the concept of unconscionability. Section 2-719(3) provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."⁶⁰

It must be noted from the outset that the opening words of section 2-719(3) explicitly authorize the contractual exclusion of consequential damages. But the section is of great significance in stating that limitation of consequential damages for personal injury in the case of consumer goods is prima facie unconscionable, and only in the exceptional case is this presumption overcome.⁶¹ It must be emphasized that this subsection only avails the consumer where the seller did not disclaim the warranties. Where the seller validly disclaims warranties under section 2-316, the provision section of 2-719(3) will be redundant.⁶²

One issue which is yet to be resolved is whether or not warranty

59. *Id.* § 2-719(a). Comment 1 explains that "where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of . . . Article [2]." This is akin to the doctrine of fundamental breach discussed *supra* notes 2-33 and accompanying text.

60. See WHITE & SUMMERS, *supra* note 37, at 472. See also Collins v. Uniroyal, Inc., 64 N.J. 260, 315 A.2d 16 (1974) (a contractual limitation of damages in the case of consumer goods is prima facie unconscionable, and manufacturer's defense that there was no defect in the tire was irrelevant to the determination of breach of the express warranty).

61. See Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn. 1974).

62. UCC section 2-302 permits a court to refuse to enforce a contract if the contract or any clause thereof is found to be unconscionable at the time it was made. The court may also delete the unconscionable result. UNIFORM COMMERCIAL CODE § 2-301(1) (1978).

disclaimers may be subject to scrutiny under the UCC's general unconscionability provision in section 2-302.⁶³ Because warranty disclaimers are governed by the specific requirements set forth in section 2-316, the question arises whether disclaimers meeting this requirement are exempted from scrutiny under section 2-302, which expressly extends the unconscionability standard to "any clause of the contract"⁶⁴ This is a hotly debated question and as noted above is as yet unresolved.⁶⁵ Some cases, however, generally support the view that warranty disclaimers must withstand attack under both UCC sections.

B. *The Magnuson-Moss Act*

One of the reasons that prompted Congress to enact the Magnuson-Moss Act⁶⁶ in 1975 was to check the ever-increasing cases of warranty disclaimer abuse by sellers.⁶⁷ Unlike the UCC, the Act is specifically designed to cover consumer sales. The Act, however, does not revise prior law in the sense that it does not require any warranty on a "consumer product"⁶⁸ to be given. The Act does not prohibit a seller of consumer products from disclaiming all warranties, including implied warranties on a "consumer product," where already permitted to do so by state law.⁶⁹ As a result, unless restricted by state law, a seller of "consumer products" may entirely disclaim all implied warranties, consistent with sections 2-314 and 2-316 of the UCC, respectively, so long as no "written warranty" is offered on such products.⁷⁰

63. *Id.* § 2-302.

64. *Id.*

65. See WHITE & SUMMERS, *supra* note 37, at 475-81.

66. Magnuson-Moss Act, *supra* note 36.

67. See H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. Code Cong. & Ad. News 7702. See also Comm. on Commerce, Report on § 356, S. Rep. No. 93-151, 93d Cong., 1st Sess. (1973).

68. Section 2301(1) defines the term "consumer product" as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." Magnuson-Moss Act, *supra* note 36.

69. "The term 'State law' includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States." Magnuson-Moss Act, *supra* note 36, § 2301(15).

70. The existence of a written warranty triggers the operation of § 2301(a)-(b) of the Magnuson-Moss Act, which prohibits a warrantor from disclaiming implied warranties where a written warranty is given, but do permit for a "limited warranty" limitation of the duration of implied warranties to that of any express warranties. *Id.*

Where a supplier offers a "full" written warranty,⁷¹ the implied warranties may not be disclaimed, modified or limited in either scope or duration.⁷² If the supplier merely offers a "limited" written warranty,⁷³ then the duration of implied warranties can be limited to the duration of the written warranty as long as such limitation is clearly disclosed on the face of the written warranty and is not unconscionable.⁷⁴

The Act does not give the consumer any great cause to rejoice as far as disclaimer abuse by sellers is concerned. As noted above, the Act only applies where the supplier offers a "written warranty," but he is not compelled to do so. Even if he so decides, he may offer only a "limited" warranty which enables him to limit the duration of the implied warranty at least to a reasonable extent.⁷⁵ The seller can limit or exclude liability for consequential damages even in a "full" warranty situation, so long as such limitation or exclusion conspicuously appears on the face of the warranty.⁷⁶

IV. CONCLUSION

It is clear from the above discussion that one common problem facing consumers in Nigeria and the United States is that of disclaimer abuse by sellers. Each nation has attacked this problem from different angles, but the problem is still prevalent. It is unfortunate that Nigeria has no special legislation protecting consumers from widely drafted exemption clauses. The courts, in a bid to check the excesses of the seller in this regard, continue to apply existing common law principles which are far from clear. Consumer protection legislation is long overdue. Nigeria should follow the example of Great Britain by making it impossible for the seller to disclaim warranties in consumer sales.⁷⁷

As noted above, Congress, in a bid to check disclaimer abuse by sellers in the United States, enacted the Magnuson-Moss Act. The Act improved somewhat on the UCC, at least where "written" warranties are given by the seller. However, where there are no "written"

71. See *id.* § 2303(a)(1) for the definition of "full warranty."

72. *Id.* § 2304(a)(2).

73. See *id.* § 2303(a)(2) for the definition of "limited warranty."

74. *Id.* § 2308(b).

75. *Id.*

76. *Id.* § 2304(a)(3).

77. See *supra* note 3 and accompanying text.

warranties, the abuses continue. The best solution is to make it impossible for the seller to disclaim warranties in consumer sales.